

**New York Mar. & Gen. Ins. Co. v Rockingham Ins.  
Co.**

2023 NY Slip Op 33483(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 156010/2021

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART 42**

*Justice*

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NEW YORK MARINE AND GENERAL INSURANCE  
COMPANY, STATESIDE CONSTRUCTION LLC, THE  
ASTRA AT GATES AVENUE, LLC

Plaintiff,

- v -

ROCKINGHAM INSURANCE COMPANY,

Defendant.

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INDEX NO. 156010/2021

MOTION DATE 3/9/23

MOTION SEQ. NO. 003

**DECISION, ORDER  
and JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 84, 85, 87, 89, 90, 91, 92, 93, 94, 96, 97, 98

were read on this motion to/for SUMMARY JUDGMENT.

In this declaratory judgment action, the plaintiffs, New York Marine and General Insurance Company (“New York Marine”), Stateside Construction LLC (“Stateside”), and The Astra at Gates Avenue, LLC (“Astra”), move pursuant to CPLR 3212 for summary judgment (1) declaring that the defendant, Rockingham Insurance Company (“Rockingham”), is obligated to defend and indemnify Stateside and Astra in an underlying personal injury action (the “Mendoza Action”) as additional insureds on, and in accordance with the terms of, the insurance policy that Rockingham issued to non-party B&H Contracting Corporation (“B&H”); and (2) requiring Rockingham to reimburse New York Marine the attorneys’ fees, costs and disbursements it has incurred in defending Stateside and Astra in the Mendoza Action (MOT SEQ 003). Rockingham opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiffs’ motion is granted and the defendant’s motion is denied.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of their motion, the plaintiffs submit, *inter alia*, the pleadings in the underlying Mendoza Action, in which the plaintiff, Jonathan Mendoza, asserts negligence and Labor Law claims against Stateside, Astra, and B&H for injuries he allegedly sustained when he was caused to fall from a scaffold while performing masonry work at premises in Brooklyn (the “Premises”) owned by Astra; the contract between Stateside, which Astra retained as general contractor for the construction work at the Premises, and B&H, a subcontractor retained by Stateside to perform masonry work, pursuant to which B&H was required to purchase and maintain commercial general liability insurance, naming Stateside and Astra as additional insureds, which would be primary and non-contributory to Stateside’s and Astra’s own insurance; the contract between B&H and SMJ Contracting LLC (“SMJ”), pursuant to which SMJ provided laborers, including Mendoza, to perform B&H’s masonry work at the Premises; the commercial general liability insurance policy issued by Rockingham to B&H for the period covering Mendoza’s alleged injury, which includes an endorsement providing for primary, non-contributory additional insured coverage to any entities that B&H agreed to name as such with respect to liability for injuries that were caused, in whole or in part, by B&H’s acts or omissions, or the acts or omissions of those acting on B&H’s behalf; the insurance policy issued by New York Marine to Stateside and Astra, which provides that coverage under the policy is excess over any other

primary insurance available to them as additional insureds; letters sent to Rockingham by Stateside and Astra, dated July 7, 2020 and January 11, 2021, tendering to Rockingham the defense and indemnification of Stateside and Astra in regard to the claims asserted against them in the Mendoza Action, together with United States Postal Service (“USPS”) tracking data showing that the second of these tender letters was mailed on January 12, 2021 and received on January 16, 2021; and Rockingham’s letter to Stateside and Astra, dated March 1, 2021, denying coverage based on a pair of policy exclusions, together with USPS tracking data showing that the denial letter was mailed on March 4, 2021 and received on March 8, 2021.

The plaintiffs’ submissions establish, *prima facie*, that B&H agreed to name Stateside and Astra as additional insureds on its commercial general liability policy, and to provide them with primary, non-contributory coverage; that the allegations in the Mendoza Action present a reasonable possibility that Mendoza’s purported injuries were caused, in whole or in part, by B&H’s acts or omissions, or the acts or omissions of those acting on B&H’s behalf at the Premises; and that, by virtue of these facts, the additional insured endorsement in the Rockingham policy issues to B&H was triggered, extending primary, non-contributory coverage to Stateside and Astra as additional insureds, and entitling them to defense and indemnity with respect to the claims asserted against them in the Mendoza Action. As such, the plaintiffs have demonstrated their *prima facie* entitlement to judgment as a matter of law.

Rockingham, in opposition, fails to raise any triable issue of fact. Indeed, Rockingham does not dispute Stateside’s and Astra’s status as additional insureds but argues instead that coverage was properly denied because the claims asserted by Mendoza in the underlying Mendoza Action are subject to a pair of policy exclusions. However, even assuming that the relevant policy exclusions apply to the plaintiffs’ coverage claims, which the plaintiffs do not

meaningfully contest, Rockingham cannot rely on those exclusions because its denial of coverage was untimely.

It is well-settled that, if insurer intends to rely on a policy exclusion, the disclaimer must be provided to the claimant “as soon as reasonably possible,” as required by Insurance Law § 3420(d). See New York Cent. Mut. Fire Ins. Co. v Aguirre, 7 NY3d 772, 774 (2006). “An insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer,” and “[t]he timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage.” Id. (internal citations and quotation marks omitted). Further, “[w]hen the basis for denying coverage was or should have been readily apparent before the onset of the delay of disclaimer, the insurer's explanation is insufficient as a matter of law.” Id. (internal quotation marks and brackets omitted). That is, there is no question of fact where, as here, “the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay.” Admiral Ins. Co. v State Farm Fire and Cas. Co., 86 AD3d 486, 490 (1<sup>st</sup> Dept. 2011).

Here, USPS tracking data demonstrates that Rockingham received Stateside’s and Astra’s second tender no later than January 16, 2021.<sup>1</sup> Together with copies of the contract between Stateside and B&H and certificates of insurance for B&H’s insurance policy, the tender letter enclosed a copy of the complaint in the Mendoza Action. As such, the bases for Rockingham’s denial of coverage—*i.e.*, the nature of Mendoza’s claims in the underlying Mendoza Action—were obvious from the face of the tender, obviating any need for Rockingham to conduct an investigation before determining whether to disclaim. Nevertheless, Rockingham delayed 48 days, until March 4, 2021, before disclaiming coverage. Given that the grounds for disclaiming

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<sup>1</sup> Although Stateside and Astra sent an earlier tender letter on July 7, 2020, there is no proof that the initial tender was received by Rockingham.

coverage were obvious from the face of the tender, Rockingham's delay in disclaiming coverage was unreasonable as a matter of law. Indeed, in First Fin. Ins. Co. v Jetco Contracting Corp., 1 NY3d 64 (2003), the Court of Appeals expressly held that an insurer's unexcused 48-day delay in disclaiming coverage is unreasonable as a matter of law. See also Hunter Roberts Const. Group, LLC v Arch Ins. Co., 75 AD3d 404 (1<sup>st</sup> Dept. 2010) (insurer's four-month delay in disclaiming coverage found unreasonable where only a cursory investigation was necessary to determine if additional insured had timely notified insurer of claim); W. 16th St. Tenants Corp. v Pub. Serv. Mut. Ins. Co., 290 AD2d 278, 279 (1<sup>st</sup> Dept. 2002) (insurer's 30-day delay in disclaiming coverage was unreasonable where the sole ground on which it disclaimed was "obvious from the face of the notice of claim and the accompanying complaint").

Rockingham contends that its delay should be excused because, more than a month before disclaiming coverage to Stateside and Astra, it had denied coverage to B&H for the claims asserted in the Mendoza Action, citing the same policy exclusions and copying Stateside's and Astra's attorneys. This contention is devoid of merit. The disclaimer to B&H makes no mention of either Stateside or Astra, let alone clearly disclaim coverage to them. Indeed, Rockingham itself plainly did not consider the denial of coverage to B&H to also be an effective denial to Stateside and Astra, or else there would have been no reason to subsequently issue them a separate disclaimer. If anything, the disclaimer to B&H simply reinforces the fact that Rockingham, being well-aware of the grounds for disclaiming coverage, has no reasonable excuse for its delay in issuing a denial to Stateside and Astra. See First Fin. Ins. Co. v Jetco Contracting Corp., *supra*.

Accordingly, upon the foregoing papers, it is

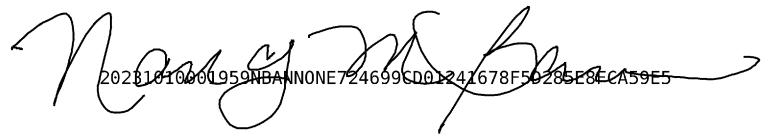
ORDERED that the plaintiffs' motion pursuant to CPLR 3212 for summary judgment is granted; and it is further

ORDERED that the defendant's cross-motion pursuant to CPLR 3212 for summary judgment is denied; and it is further

ADJUDGED and DECLARED that the defendant, Rockingham Insurance Company, is obligated to (1) defend and indemnify the plaintiffs, Stateside Construction LLC and The Astra at Gates Avenue, LLC, against the claims asserted in the underlying personal injury action, Jonathan Daniel Lopez Mendoza v Stateside Construction LLC, The Astra at Gates Avenue, LLC, and B&H Contracting Corp., Index No. 505883/2020, currently pending in the Supreme Court, Kings County, to the extent of, and in accordance with, the terms of the applicable primary insurance policy issued by the defendant to non-party B&H Contracting Corporation, and (2) reimburse the plaintiff, New York Marine and General Insurance Company, the attorneys' fees, costs and disbursements it has incurred in defending the plaintiffs, Stateside Construction LLC and The Astra at Gates Avenue, LLC, in that underlying personal injury action; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the court.



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10/5/2023  
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER